No. 89-748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

v.

ROBERT L. CLARKE, OFFICE OF THE COMPTROLLER OF THE CURRENCY, and SECURITY PACIFIC NATIONAL BANK

Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION OF THE SECURITIES INDUSTRY ASSOCIATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Congress enacted the flat securities underwriting prohibitions of the Glass-Steagall Act in 1933 as amendments to Section 8 of the National Bank Act specifically in order to prevent the Comptroller of the Currency from continuing to authorize banks to underwrite securities as an "incidental" banking power under Section 8. Given this express Congressional mandate, did the court below err in upholding an order of the Comptroller permitting banks for the first time since 1933 to underwrite private mortgage-backed securities on the grounds that, since the Comptroller authorized the securities underwriting as an incidental banking power, the securities underwriting did not and could not violate the securities underwriting prohibitions of the Glass-Steagall Act?

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.*

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* Pursuant to Rule 28.1 of this Court, *amicus curiae* Investment Company Institute (the "Institute") states that it is the national association of the American investment company industry. The Institute's membership includes approximately 2,900 open-end investment companies (commonly known as "mutual funds"), 170 closed-end investment companies and 14 sponsors of unit investment trusts. The Institute's mutual fund members have assets of about $908 billion, accounting for over 90% of total industry assets, and have over 30 million shareholders. The Institute's membership also includes the investment advisers and principal underwriters for its investment company members.

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Amicus Curiae Investment Company Institute (the "Institute") respectfully submits this brief in support of the Petition of the Securities Industry Association (the "SIA") requesting that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on September 8, 1989.

INTEREST OF THE INSTITUTE

The Institute is the national association of the American investment company industry. The Institute's membership includes open-end investment companies (commonly known as "mutual funds"), closed-end investment companies, unit investment trusts and the investment advisers and principal underwriters of its investment company members. The Institute is generally recognized as the primary

spokesman for the investment company industry and, as such, has been intimately involved in numerous judicial and administrative proceedings with respect to the scope and application of the Glass-Steagall Act, both as a party, *see, e.g., Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. 46 (1981) ("*Board of Governors*"); *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*Camp*"), and as *amicus curiae, see, e.g., Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 137 (1984) ("*Becker*"). As a result of this involvement and the Institute's appearances before this Court on Glass-Steagall Act matters, the Institute has thoroughly studied the history of and Congressional debates surrounding the enactment of the Glass-Steagall Act and is intimately familiar with the decisions of this Court interpreting the Act.

The Institute has a substantial interest in this case because its members are adversely affected by the Court of Appeals decision under review. The decision substantially repeals the Glass-Steagall Act, the fundamental federal statute enacted more than fifty years ago to establish the structure of the financial services industry in this country by separating commercial from investment banking. The Institute's members are concerned that, although most of them do not underwrite private mortgage-backed securities, the specific securities at issue in this case, the banking regulators will attempt to extend the language and rationale of the Second Circuit's opinion to authorize incursions into other areas of the securities business, including the investment company business, forbidden to banks by Congress over fifty years ago.

STATEMENT OF THE CASE

The Institute adopts the statement of the case set forth in the Petition of the SIA.

REASONS FOR GRANTING THE WRIT

The Second Circuit decision under review affirms an order of the Office of the Comptroller of the Currency (the "OCC" or the "Comptroller") permitting members of the nation's banking industry,

for the first time since 1933, to underwrite private mortgage-backed securities, notwithstanding the flat prohibitions of the Glass-Steagall Act expressly forbidding banks to underwrite securities. The Second Circuit concluded that, because the Comptroller had pronounced bank underwriting of private mortgage-backed securities to be a "convenient and useful" way of selling loans, and thus an activity "incidental" to banking within the meaning of Section 8 of the National Bank Act, such securities underwriting does not, and indeed *cannot*, violate the securities underwriting prohibitions of Glass-Steagall Act Sections 16 and 21. *Securities Industry Association* v. *Clarke*, Nos. 89-6027, 89-6029, slip op. at 29-36 (2d Cir. Sept. 8, 1989).[1] The Second Circuit reached this unprecedented result without ever mentioning, much less analyzing, that Congress enacted the Glass-Steagall Act specifically to prevent the Comptroller from authorizing securities underwriting activity as an incidental power; without mentioning, much less analyzing, the language and legislative history of the Glass-Steagall Act documenting that Congress in 1933 intended the Act to prohibit banks from underwriting their securitized loans; without mentioning, much less analyzing, the unbroken line of OCC and Federal Reserve Board decisions rendered since 1933 holding that the Glass-Steagall Act prohibits banks from underwriting private mortgage-backed securities; and without mentioning, much less analyzing, Congress' considered, deliberate and explicit refusal to amend the Glass-Steagall Act as recently as 1984 to permit banks to underwrite private mortgage-backed securities (Op. at 29-36).

As the SIA has demonstrated in its Petition, the decision below raises fundamental questions of national importance. The decision simply demolishes the Glass-Steagall Act. The decision is completely at odds with the prior decisions of this Court. The decision replaces Congress' legislative structure of flat statutory prohibitions forbidding bank securities underwriting activities, subject only to Congressional exception, modification or repeal, with a regulatory regime permitting *ad hoc* administrative authorization of a wide range of bank securities underwriting based solely on the agency's administrative assessment of the convenience the activity provides for banks.

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[1] Subsequent citations to the Second Circuit decision appear herein as (Op. at ___).

In short, the decision below presents basic and fundamental challenges, not only to Congress' substantive policy choice with respect to the scope of permissible bank securities activities, but also to Congress' structural decision to reserve to itself, rather than to delegate to any agency, the authority and responsibility for making that choice. The effect of the Court of Appeals' opinion, if allowed to stand, would be to sanction wholesale administrative dismantlement of the Glass-Steagall Act prohibitions and inevitably to expand the caseload of the federal judiciary as review of these *ad hoc* rulings is sought. Action by this Court is necessary not only to reaffirm the primacy of the substantive and structural policy decisions Congress made and embodied in the Glass-Steagall Act, but also to reaffirm that lower courts may not countenance repeal of an Act of Congress in the course of deferring to arguments offered by banking regulators in an effort to rationalize a bank's current wish to circumvent Congress' flat prohibitions and to enter the securities underwriting business through some new scheme. *Cf. Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 150-51 (1963). The issues raised by this case are of enormous legal and economic significance and warrant plenary review by this Court.

First. By holding that bank underwriting of securities does not and cannot violate the Glass-Steagall Act when the Comptroller deems the activity to be convenient and useful to an express banking power and thus "incidental" to banking under Section 8 of the National Bank Act, the decision below substantially repeals the Glass-Steagall Act and eviscerates the Congressional purpose underlying its enactment. *Congress specifically enacted the Glass-Steagall Act precisely to prevent the Comptroller from authorizing securities underwriting activities to banks under the rubric of incidental powers.*

When Congress enacted the National Bank Act in 1864, it authorized national banks in Section 8, codified at 12 U.S.C. § 24 (Seventh), to engage in five specific powers comprising the business of banking and "such incidental powers as shall be necessary to carry on th[at] business." 12 U.S.C. § 24 (Seventh) (Supp. V 1987). Although nothing in Section 8 grants banks the power to underwrite securities, the Comptroller began in 1908 to permit the activity on the grounds that it was incidental to the express powers set forth in

National Bank Act Section 8. *See Becker*, 468 U.S. at 145; *Camp*, 401 U.S. at 629. In 1927, Congress amended Section 8 of the National Bank Act through the McFadden Act to authorize national banks to underwrite certain investment securities expressly and thereby "to legalize that which the banks are doing now without authority of law." 67 Cong. Rec. 3232 (1926) (remarks of Rep. McFadden).[2] Following this amendment to Section 8, bank participation in the securities underwriting business continued to expand to the point where banks became the "dominant" force in the field. Perkins, *The Divorce of Commercial and Investment Banking in the United States: A History*, 88 Banking L. J. 483, 495-96 (1971).

Just a few years later, the stock market crashed in 1929 and the nation's banking industry collapsed shortly thereafter. Following extensive hearings designed to unearth the causes of the catastrophe, Congress concluded that "commercial bank involvement in securities had made 'one of the greatest contributions to the unprecedented disaster which has caused this almost incurable depression.'" *Becker*, 468 U.S. at 145 (citation omitted). Congress determined to prevent any possible recurrence by enacting the Glass-Steagall Act in order to "separat[e] as completely as possible commercial from investment banking." *Board of Governors*, 450 U.S. at 70.

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[2] Representative McFadden, the legislation's sponsor, explained that "it is a matter of common knowledge that national banks have been engaged in the investment-securities business * * * for a number of years * * * under their incidental corporate powers to conduct the banking business." 67 Cong. Rec. 2828 (1926) (remarks of Rep. McFadden). Congress enacted the McFadden Act to amend Section 8 of the National Bank Act and to "affirm and regulate practices which have grown up within the national banking system under the exercise of incidental corporate powers." H.R. Rep. No. 83, 69th Cong., 1st Sess. 2 (1926). Through the McFadden Act, Congress added the following proviso immediately following the powers provisions of Section 8:

> Provided, that the business of buying and selling investment securities shall hereafter be limited to buying and selling without recourse marketable obligations evidencing indebtedness of any person, copartnership, association, or corporation, in the form of bonds, notes and/or debentures, commonly known as investment securities, under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency * * *.

McFadden Act, Pub. L. No. 69-639, § 2(b), 44 Stat. 1224, 1226 (1927).

As this Court repeatedly has instructed, the 1933 Congress designed the Glass-Steagall Act as "a prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *Camp*, 401 U.S. at 639. "The Act's design reflects the congressional perception that certain investment banking activities are fundamentally incompatible with commercial banking." *Becker*, 468 U.S. at 147. The Act "reflects Congress' conclusion that the mere existence of a securities operation, 'no matter how carefully and conservatively run, is inconsistent with the best interests' of the bank as a whole." *Id.* at 157 (quoting 75 Cong. Rec. 9913 (1932) (remarks of Sen. Bulkley)). The Act embodies Congress' considered legislative judgment that "policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business [are] outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act." *Camp*, 401 U.S. at 630.

To leave no doubt concerning its intentions, and to ensure that future Comptrollers did not seek to override the legislative will, Congress cast the Glass-Steagall Act in part as direct amendments to the powers provisions of Section 8 of the National Bank Act. Through Section 16 of the Glass-Steagall Act, Congress amended Section 8 of the National Bank Act to delete the McFadden Act's investment securities underwriting authorization and to insert express statutory language forbidding national banks to "underwrite any issue of securities." *See* Pub. L. No. 73-66, § 16, 48 Stat. 162, 185 (1933).[3] The Congressional purpose could not be clearer. No longer were

[3] Through Section 16 of the Glass-Steagall Act, Congress replaced the McFadden Act proviso to National Bank Act Section 8, *supra* note 2, at 5, with the following language:

> The business of dealing in investment securities by the association shall be limited to purchasing and selling such securities without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, *and the association shall not underwrite any issue of securities*: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe * * *. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the purchase by the association of any shares of stock of any corporation.

national banks or the OCC to claim that incidental powers authorized banks to engage in the securities underwriting business.[4]

The decision below simply demolishes the statutory structure. Notwithstanding this history and clear Congressional design — nowhere even mentioned in the decision below — the Court of Appeals affirmed the Comptroller's order on the sole ground that the Comptroller's claim that bank underwriting of private mortgage-backed securities was "convenient and useful" and thus "incidental" was "reasonable" (Op. at 34). The Court of Appeals reached this conclusion without examining the language, legislative history or purpose of the Glass-Steagall Act even *once* during the course of its National Bank Act review (Op. at 33-34) and also refused to examine the Act thereafter on the grounds that the OCC's National Bank Act determination made it "unnecessary to consider the application of the Glass-Steagall prohibition on national banks' 'under[writing] securities'" (Op. at 29) (brackets in original); (*see* Op. at 36). Indeed, the Court of Appeals declared that, "even if SPN Bank's activity here were to be considered underwriting * * * securities" within the meaning of the Glass-Steagall Act, the Act's prohibitions were not and could not be violated since the Comptroller had pronounced the activity to be convenient and useful and thus "incidental" under Section 8 of the National Bank Act (Op. at 36) (elipses in original). In short, the Second Circuit not only circularly refused to examine, but announced to be irrelevant as a matter of law, the very statute Congress enacted to build a barrier around the incidental powers clause and to prohibit bank securities underwriting activities. With a

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See Pub. L. No. 73-66, § 16, 48 Stat. 162, 184-185 (1933) (emphasis supplied). In 1935, Congress further strengthened Section 16 by, among other things, amending the first sentence set forth above to extend its limitations to cover all "securities and stock," and not just investment securities. *See* Banking Act of 1935, Pub. L. No. 74-305, § 308, 49 Stat. 684, 709 (1935).

[4] The adamance of Congress' intent is reflected by Congress' prohibition of securities underwriting powers to banks of all types. Through Section 5(c) of the Glass-Steagall Act, 12 U.S.C. § 335 (1982), Congress extended the securities underwriting bar of Section 16 to state-chartered member banks of the Federal Reserve System. *See* 12 U.S.C. § 335 (1982); *Becker*, 468 U.S. at 148. And, through Section 21 of the Act, Congress forbade all depository institutions to engage in underwriting securities. *See* 12 U.S.C. § 378(a)(1) (1982); *Becker*, 468 U.S. at 148; *Board of Governors*, 450 U.S. at 58 n.24.

few short strokes of a pen, the court simply crossed the Glass-Steagall Act out of the statute books.

Judicial repeal of the Glass-Steagall Act, however, cannot be justified on the basis that banks find it convenient to underwrite securities. Banks today, just like in the 1920s, undoubtedly consider it useful to underwrite their securitized loans for *a variety of reasons*. And, as the constant but unsuccessful pressure from the banking industry for legislative relaxation of Glass-Steagall reveals, banks deem it to be convenient to underwrite securities of *all sorts and types*, well beyond the specific private mortgage-backed securities at issue here. To permit the Comptroller to disregard the Glass-Steagall Act and to sanction bank re-entry into the securities underwriting business merely because the *agency* shares the *industry's* assessment of the convenience of the activity, however, is to stand the Constitution's allocation of legislative power on its head. The Glass-Steagall Act represents *Congress'* considered legislative judgment that "policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business [are] outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in activities proscribed by the Act." *Camp*, 401 U.S. at 630. *Accord, Becker*, 468 U.S. at 147-48 & n.6. Under Article I of the Constitution, it is the judgment of *Congress*, and not the *Comptroller*, that is controlling on the question presented here. *See infra*, at 9-12.

Nor can the Second Circuit's repeal of the Glass-Steagall Act be rationalized on the ground that securities underwriting activities simply constitute "new ways of conducting the very old business of banking" (Op. at 23) (citations omitted). That is precisely the argument the Comptroller advanced in the first quarter of this century to justify initial bank entry into the securities underwriting business, and that is precisely the argument whose further use Congress enacted the Glass-Steagall Act to prevent. Even more egregiously, the decision below teaches future federal courts that, in scrutinizing contentions that bank securities activities are incidental to banking, they must do so without ever examining the language, history or purpose of the Glass-Steagall Act in the course of judicial review (Op. at 29-34). This myopic and truncated inquiry, however, by definition precludes lower courts from evaluating whether a particular activity constitutes

a "new" but *permissible* way of carrying on the business of banking, or in fact constitutes one of the *impermissible* activities that Congress enacted the Glass-Steagall Act specifically to prohibit to banks.

Action by this Court is essential to prevent wholesale dismantlement of the Act's prohibitions. Section 16 of the Glass-Steagall Act generally prohibits banks from "underwriting" and "dealing in" securities and from purchasing securities for the banks' "own account." *See* 12 U.S.C. § 24 (Seventh) (Supp. V 1987). And, while Section 16 through express exception permits banks to own certain specific and limited securities that Congress specifically has chosen to favor, Section 16 prohibits banks from underwriting some of them *at all* and permits banks to underwrite others subject to strict 10% capital and surplus limitations. *See id.* If the Comptroller is authorized to permit banks to underwrite private mortgage-backed securities notwithstanding the Glass-Steagall Act's underwriting prohibitions simply by announcing the activity to be convenient and useful to some express banking power, there would appear to be no impediment to the Comptroller's repeal of the Act's remaining prohibitions through precisely this same analysis.

Second. The opinion below fundamentally misconceives the role of administrative agencies and courts in effectuating the basic policy decisions Congress has mandated in the financial services arena. This Court has unequivocally and unambiguously held that, if existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the [banking agencies] or the courts, to address." *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). By authorizing the OCC to permit banks to engage in any and all securities underwriting activities the OCC deems to be "convenient and useful," the court below turned this basic precept on its head. Action by this Court is necessary not only to reaffirm the primacy of Congress' policy choice to "flatly prohibit banks from engaging in the [securities] underwriting business," *Board of Governors*, 450 U.S. at 58 n.24, but also to preserve Congress' structural decision to reserve to itself, rather than to delegate to any agency, the authority and responsibility for making that choice.

Following the stock market collapse of 1929 and the ensuing wave of bank failures, Congress considered proposals to permit commercial banks to continue to engage in the securities underwriting business subject to case-by-case approval and continuing oversight by federal banking regulators. *Becker*, 468 U.S. at 147-48 & n.6; *Board of Governors*, 450 U.S. at 70. "Congress rejected a regulatory approach" when it drafted the Glass-Steagall Act, *Becker*, 468 U.S. at 153, however, in favor of a "broad structural approach" comprised of flat statutory "prohibitions" subject only to legislative amendment or repeal. *Id.* at 147. Almost immediately following the Glass-Steagall Act's enactment, the nation's banking industry unsuccessfully pressed Congress to abandon this approach,[5] and the pressure has intensified in recent years.[6] But, while Congress has enacted *other* major changes to the federal banking laws in the last decade which have materially altered the statutory framework governing financial institutions,[7]

[5] *See, e.g.*, H.R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. 53 (1935) (unadopted bill which, if enacted, would have permitted national banks, "under regulation by the Comptroller of the Currency, to underwrite and sell" various securities).

[6] *See, e.g.*, S. Rep. No. 1351, 90th Cong., 2d Sess. 9-11, 19-26 (1968); S. Rep. No. 184, 91st Cong., 1st Sess. 10-12, 22-28 (1969); H.R. Rep. No. 1382, 91st Cong., 2d Sess. 9-10 (1970); S. 1720, 97th Cong., 1st Sess. § 302, 127 Cong. Rec. 23,617, 23,627 (1981); S. 2490, 97th Cong., 2d Sess. § 10, 128 Cong. Rec. 8743, 8744 (1982); S. 1821, 98th Cong., lst Sess. § 104, 129 Cong. Rec. S11,779, S11,783 (daily ed. Aug. 4, 1983); S. 2181, 98th Cong., 1st Sess. § 104, 129 Cong. Rec. S17,033, S17,034 (daily ed. Nov. 18, 1983); S. 2851, 98th Cong., 2d Sess. § 104, 130 Cong. Rec. 25,340 (1984); S. Rep. No. 293, 98th Cong., 2d Sess. 9 (1984); S. Rep. No. 560, 98th Cong., 2d Sess. 97 (1984); H.R. Rep. No. 994, 98th Cong., 2d Sess. 43, 50-51 (1984); S. 2592, 99th Cong., 2d Sess. §§ 601-612, 132 Cong. Rec. S8318, S8329 (daily ed. June 24, 1986); S. 1886, 100th Cong., 2d Sess. §§ 101, 102, 134 Cong. Rec. S3360, S3360-62 (daily ed. Mar. 30, 1988); H.R. Rep. No. 822, 100th Cong., 2d Sess., pt. 1, at 2-3 (1988); H.R. Rep. No. 822, 100th Cong., 2d Sess., pt. 2, at 2-4 (1988). *See also Hearings on S. 1933 and S. 2474 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 93d Cong., 2d Sess. 6, 136 (1974) (noting that legislation designed to amend the Glass-Steagall Act to authorize banks to underwrite and deal in various securities had been introduced and defeated in 1935, 1938, 1945, 1955, 1957, 1962, 1963, 1965, 1967 and 1973).

[7] *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989); Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 92-221, 94 Stat. 132 (1980); Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

Congress repeatedly has refused to enact legislation which would modify the "broad structural approach" embodied in the Glass-Steagall Act's prohibitions. *See Becker*, 468 U.S. at 153. Congress refused to do so once again just as recently as last year.[8]

Moreover, where Congress has deemed it appropriate to make certain exceptions to the Act's flat securities underwriting bar, Congress *itself* has amended the Glass-Steagall Act in order to create an express *exception* for those securities "Congress specifically has chosen to favor." *Becker*, 468 U.S. at 157. Congress has not done so for bank underwriting of private mortgage-backed securities. Indeed, while Congress did enact the Secondary Mortgage Market Enhancement Act in 1984 to exempt the precise "mortgage-related securities" at issue here from the Glass-Steagall Act's prohibitions on bank *purchases* of *securities*,[9] Congress considered but deliberately and expressly refused to adopt in that same legislative process amendments to the Glass-Steagall Act which would have provided banks the authority to underwrite and deal in such securities.[10]

In addition to contravening Congress' structural decision to reserve to itself the responsibility for deciding whether and what securities banks should be permitted to underwrite, the decision below unilaterally vests authority to restructure the federal statutory framework governing the nation's banking and securities industry in the hands of an agency which has openly declared its disregard for the constitutional allocation of legislative power and which has openly expressed its contempt for the Congressional policy judgments em-

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[8] *See* S. 1886, 100th Cong., 2d Sess. §§ 101, 102, 134 Cong. Rec. S3360, S3360-62 (daily ed. Mar. 30, 1988); H.R. Rep. No. 822, 100th Cong., 2d Sess., pt. 1, at 2-3 (1988); H.R. Rep. No. 822, 100th Cong., 2d Sess., pt. 2, at 2-4 (1988).

[9] Congress added a new sentence to 12 U.S.C. § 24 (Seventh) providing that:

> The limitations and restrictions contained in this paragraph as to [a bank] *purchasing* for its own account investment securities shall not apply to securities that * * * are mortgage related securities (as that term is defined in section 3(a)(41) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(41)) * * *.

12 U.S.C. § 24 (Seventh) (Supp. V 1987) (emphasis supplied).

[10] *See* S. Rep. No. 560, 98th Cong., 2d Sess. 97 (1984); S. Rep. No. 293, 98th Cong., 2d Sess. 9 (1984). *See also* H.R. Rep. No. 994, 98th Cong., 2d Sess. 43, 50-51 (1984).

bodied in the Glass-Steagall Act. Thus, the OCC publicly has "advised banks not to 'wait for Congress to change the law if [they] want to offer new products,'"[11] and publicly has committed itself to helping banks "circumvent[ ] Congress in expanding bank powers" and in "redefin[ing] what banking entails today."[12] In fact, the OCC's commitment has been so enthusiastic that Congress responded in 1980 by expressly denying to the Comptroller all rulemaking power concerning the "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act,'" 12 U.S.C. § 93a (1982), and again in 1987 by enacting an extraordinary one-year legislative moratorium prohibiting the OCC from granting any new securities powers to national banks "by action, inaction or otherwise." Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(2), 101 Stat. 552, 582 (1987). Amazingly, the OCC was unperturbed by the implications of the Congressional injunction:

> 'I consider the moratorium to be a compliment to the regulators perverse, but a compliment nonetheless,' [OCC Chief Counsel] Fitzgerald said. 'It shows that the Senate recognizes that the regulators have been doing what Congress should be doing. It is intended to slow us down so that Congress can catch up. It illustrates that the Senate is concerned that Congress might become irrelevant in the evolution of banking regulation.'[13]

Third. By holding that the Comptroller's pronouncement that bank underwriting of private mortgage-backed securities was "convenient and useful" and thus "incidental" under Section 8 of the National Bank Act made it "unnecessary to consider the application

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[11] *New Bank Powers Unlikely But Farm Debt, Court Ruling Could Spur Congress to Act*, 44 Wash. Fin. Rep. (BNA) No. 8, at 346 (Feb. 25, 1985) (statement of OCC Chief Counsel Richard Fitzgerald).

[12] *Don't Wait For Congress, Banks Are Told*, American Banker, June 11, 1987, at 2 (statement of OCC Chief Counsel Richard Fitzgerald) ("*Don't Wait For Congress*"). *See also* OCC Press Release, *Boom Or Doom: What's In The Cards For Commercial Banks?*, Apr. 2, 1984, at 4 (remarks of Comptroller C. T. Conover) ("[s]ince I became Comptroller," the OCC has "act[ed] as an agent of change" and "ha[s] been able at least to loosen the choke hold of unnecessarily tight restrictions on commercial banks").

[13] *Don't Wait For Congress*, at 2.

of the Glass-Steagall prohibitions" and was "sufficient to resolve the [Glass-Steagall] dispute" (Op. at 29), the decision below tramples the decisions of this Court.

In *Camp*, for example, the Comptroller had authorized national banks to engage in the mutual fund business as a permissible "fiduciary" power of banks under 12 U.S.C. § 92a (1982). The District Court struck down the Comptroller's ruling, holding that 12 U.S.C. § 92a did not authorize banks to engage in the mutual fund business and that, in any event, Sections 16 and 21 of the Glass-Steagall Act affirmatively prohibited the activity. *Investment Company Institute* v. *Camp*, 274 F. Supp. 624, 640, 641, 648 (D.D.C. 1967). The Court of Appeals reversed on both grounds, determining that mutual fund activities were simply "a new and free-wheeling form of fiduciary activity" authorized by 12 U.S.C. § 92a and in any event were not prohibited by the terms of the Glass-Steagall Act. *National Association of Securities Dealers, Inc.* v. *Securities & Exchange Commission*, 420 F.2d 83, 87, 88-91 (D.C. Cir. 1969).

On review, this Court accepted and did not disturb the Court of Appeals' conclusion that mutual fund activities, absent the prohibitions of the Glass-Steagall Act, were permissible under 12 U.S.C. § 92a (1982). *See Camp*, 401 U.S. at 624-25 ("[n]o provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers"). This Court reversed the Court of Appeals' judgment and struck down the Comptroller's decision, however, precisely because Congress intended the Glass-Steagall Act to prohibit the activity. "[T]he operation of an investment fund of the kind approved by the Comptroller involves a bank in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act." *Id.* at 639.[14]

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[14] The "IRA cases" cited by the Second Circuit in support of its decision (Op. at 38) further demonstrate the fundamental error infecting the judgment below. In those cases, the Comptroller authorized national banks to operate collective investment funds for individual retirement account assets under 12 U.S.C. § 92a. In upholding the Comptroller's decision, the Courts of Appeals did not rely upon, much less deem controlling, the Comptroller's determination that, absent the Glass-Steagall Act's prohibitions, 12 U.S.C. § 92a permitted the activity the Comptroller had authorized. The Courts of Appeals affirmed the Comptroller's decisions only after examining the

Similarly, in *Becker*, this Court reviewed an order of the Federal Reserve Board permitting Bankers Trust, a New York chartered state member bank, to market commercial paper. It was undisputed that the New York state banking regulators had authorized the marketing activity to Bankers Trust under New York state banking law, and the Federal Reserve Board subsequently concluded that the activity did not violate the Glass-Steagall Act because commercial paper was not a Glass-Steagall "security." *Becker*, 468 U.S. at 141. In reviewing the Federal Reserve Board's decision, this Court did not even refer to, much less deem controlling, the conclusion of New York state banking regulators that, absent Glass-Steagall prohibitions, marketing of commercial paper was a permissible activity for Bankers Trust.

The pertinent inquiry, the Court made clear, was whether Congress intended the Glass-Steagall Act's prohibition against securities underwriting to forbid the activity to state member banks:

> Section 16 [of the Glass-Steagall Act] limits the involvement of a commercial bank in the 'business of dealing in stock and securities' and prohibits a national bank from buying securities, other than 'investment securities,' for its own account. In addition, the section [provides] that a national bank 'shall not underwrite any issue of securities or stock.' Section 5(c) of the Act makes Section 16's limitations applicable to state banks that are members of the Federal Reserve System. It is therefore clear that Bankers Trust may not underwrite commercial paper if commercial paper is a 'security' within the meaning of the Act.

Becker, 468 U.S. at 148 (citations omitted). Concluding that commercial paper indeed was a "security" within the meaning of the Glass-Steagall Act, the Court reversed the Federal Reserve Board's ruling and remanded for determination of whether the bank's placement activity constituted "underwriting" within the meaning of the Act.

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language, legislative history, and purpose of the Glass-Steagall Act, and determining that the activities at issue did not transgress the Act's flat prohibitions. *See, e.g., Investment Company Institute* v. *Conover*, 790 F.2d 925, 931 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986).

Becker, 468 U.S. at 160 n.12. The decision below is completely at odds with both *Becker* and *Camp*.[15]

Fourth. The decision below raises critical issues concerning the deference to be extended by courts in review of agency decisions. In holding that bank underwriting of private mortgage-backed securities cannot violate the Glass-Steagall Act because the Comptroller has deemed the activity to be convenient and useful to banks under Section 8 of the National Bank Act, the court below improperly abdicated the judiciary's fundamental responsibility "to construe the language employed by Congress" in expressing its will through the Glass-Steagall Act. *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). Indeed, this Court only recently reaffirmed that "[a]gency deference has not come so far" as to amount to the virtual "carte blanche" extended to the Comptroller by the court below. *Bowen* v. *American Hospital Association*, 476 U.S. 610, 626, 645 (1986). The judgment below represents nothing less than "judicial inertia result[ing] in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co* v. *National Labor Relations Board*, 380 U.S. 300, 318 (1965).

The nature of the ruling under review confirms that the Court of Appeals' refusal to perform the "quintessential judicial function" of

[15] Nothing in footnote 11 of *Becker* supports the evisceration of the Glass-Steagall Act brought about by the decision below. In *Becker*, the Federal Reserve Board had argued that commercial paper could not be a Glass-Steagall "security" because the Glass-Steagall Act prohibited banks from purchasing securities for their own account, while banks historically had purchased commercial paper for their own accounts and the legislative history of the Glass-Steagall Act demonstrated that Congress intended the Act to encourage this activity. *See Becker*, 468 U.S. at 158. This Court concluded that commercial paper indeed was a Glass-Steagall security, and dismissed the apparent conundrum posed by the Board on the grounds that Congress simply did not intend the Glass-Steagall Act to prohibit bank purchases of commercial paper. *Id.* at 158 n.11; *see id.* at 167 n.8 (O'Connor, J. dissenting). The same conclusion obviously does not apply here, where the legislative history of the Glass-Steagall Act specifically documents that Congress intended the Act's securities underwriting prohibitions to forbid bank underwriting of securitized loans, *see* 75 Cong. Rec. 9912 (1932) (remarks of Sen. Bulkley); 77 Cong. Rec. 3954 (1933) (remarks of Rep. Bacon), and thus to prohibit bank underwriting of private mortgage-backed securities, as the OCC previously has recognized, *see infra* note 18, at 16, as the Federal Reserve Board consistently has held, *see infra* note 19, at 16-17, and as the Second Circuit did not dispute (Op. at 29-36).

statutory construction was particularly mistaken here. *Bureau of Alcohol, Tobacco and Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 98 n.8 (1983). While this Court has recognized that judicial restraint might be appropriate in evaluating agency decisions which reflect a cautious or limiting construction of agency authority *vis-a-vis* coordinate branches of the federal government or the States, this Court consistently has insisted upon close scrutiny of agency decisions which, as here, reflect self-aggrandizing bureaucratic behavior dismissing Congress' fundamental policy decisions and objectives.[16] The transformation of a clear, proscriptive statute broadly forbidding bank securities underwriting into a statute permitting *ad hoc* administrative authorization of the precise activity forbidden, based upon the agency's own assessment of the convenience involved, and notwithstanding Congress' refusal to grant regulators such authority in the first place,[17] plainly demanded heightened, not relaxed, judicial review.

Moreover, under any conceivable standard, the deference accorded the Comptroller's ruling is untenable. The ruling did not mention, much less analyze, prior OCC precedent holding that private mortgage-backed securities are Glass-Steagall securities.[18] Nor did the OCC decision cite, much less discuss, the 1987 decision of the Federal Reserve Board holding that the sort of certificates involved here are "securities" under the Glass-Steagall Act which "may not * * * be underwritten or dealt in by member banks."[19] And the OCC

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[16] *Compare Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 476 U.S. 426 (1986) *and Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) *with National Labor Relations Board* v. *Financial Institute Employees*, 475 U.S. 192 (1986); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986); *Lowe* v. *Securities & Exchange Commission*, 472 U.S. 181 (1985) *and Becker*, 468 U.S. at 142-44.

[17] *See* 12 U.S.C. § 93a (1982); *Becker*, 468 U.S. at 153-54.

[18] Prior to the agency decision under review, the OCC held that mortgage-backed securities of the type involved here are "investment securities" that "a bank may purchase and sell for its own account *but not deal in or underwrite*" under Section 16 of the Glass-Steagall Act. Comptroller Staff Interpretive Letter No. 7 (Dec. 12, 1977), *reprinted in* [1978-79 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶85,082 (1977) (emphasis supplied).

[19] *Citicorp*, 73 Fed. Res. Bull. 473 (1987), *aff'd sub nom. Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 839 F.2d 47 (2d

decision did not even attempt to square its result with Congress' refusal to amend the Glass-Steagall Act in 1984 to permit the precise activity the Comptroller had just authorized.

Although this Court repeatedly has instructed that deference to administrative rulings depends solely upon their "power to persuade," *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *see National Labor Relations Board* v. *United Food and Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987); *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987), the court below simply accepted the Comptroller's decision notwithstanding these fundamental and gaping omissions in its analysis and notwithstanding the longstanding and contrary views of the Federal Reserve Board. *See Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497, 503 (D.C. Cir. 1968) (refusing to extend deference to OCC Glass-Steagall Act ruling which was inconsistent with prior OCC rulings and which conflicted with decisions of the Federal Reserve Board). More fundamentally, the Court of Appeals deferred to the agency's decision without even examining for itself whether the decision could be squared with the language, legislative history or purpose of the Glass-Steagall Act and even though the effect of the decision was to all but eliminate the Glass-Steagall Act from the statute books. This Court repeatedly has directed, however, that a reviewing court "*must* reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Becker*, 468 U.S. at 143 (emphasis supplied) (citations omitted). The Court of Appeals' failure to honor its Article III

Cir.), *cert. denied*, ___U.S.___, 108 S. Ct. 2830 (1988). The Federal Reserve Board has consistently held, virtually since the enactment of the Glass-Steagall Act, that certificates representing undivided interests in pools of mortgage notes are within the Glass-Steagall proscriptions. *See, e.g., Securities Company Within Provisions of Sections 20 and 32 of Banking Act of 1933*, 20 Fed. Res. Bull. 485, 486 (1934); *Mortgage Investment Company Issuing Bonds as Securities*, 3 Fed. Res. Reg. Serv. ¶ 3-897 (1934). In its 1987 *Citicorp* ruling, the Board confirmed that congressional concern about the dangers inherent in bank underwriting of private mortgage-backed securities was "one of the principal reasons for the Glass-Steagall Act." *Citicorp*, 73 Fed. Res. Bull. at 499. The Board declared that the Glass-Steagall Act's "requirement of an unaffiliated underwriter" ensures that "an independent and impartial credit judgment" will be made in connection with the sale of those securities. *Id.*

responsibilities transformed the practice of judicial deference to agency actions in areas committed to agency expertise into blind judicial acquiescence to an agency's arrogation of power inconsistent with Congress' own substantive and structural plan.

CONCLUSION

The opinion below, if allowed to stand, will almost certainly signal to lower courts and federal regulators an abdication of the judiciary's duty to interpret faithfully the statutes enacted by Congress and to prevent the administrative dismantling of the fundamental and longstanding expression of national banking policy embodied in the Glass-Steagall Act. Absent action by the Court, bank regulators are likely to continue, as here, to authorize activities that Congress deliberately has prohibited and to assume policy decisions of enormous economic significance that properly may be made only by Congress. This Court has affirmed that any "realignment of our nation's financial industries is for the elected representatives of our nation to bring to fruition by comprehensive legislation, and not for fiat by judicial decree or by administrative policymaking." *A.G. Becker, Inc.* v. *Board of Governors of the Federal Reserve System*, 519 F. Supp. 602, 616 (D.D.C. 1981) (footnote omitted), *rev'd*, 693 F.2d 136 (D.C. Cir. 1982), *rev'd sub nom. Securities Industry Association* v. *Board of Governors of the Federal Reserve System*, 468 U.S. 137 (1984). This Court's intervention thus is critical to reaffirm that "there are limits * * * on how far an agency properly may go in its interpretive role," and that deference cannot substitute for the judicial "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 566 & n.20 (1979).

For the reasons set forth above, and those set forth in the Petition of the SIA, the requested Writ of Certiorari should issue.

Respectfully submitted,

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